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No. 775

In the
Supreme Court of the United States
OCTOBER TERM, 1970

SCHOOL DISTRICT 151 OF COOK COUNTY, ILLINOIS, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Government's semantic quibbles obscure rather than clarify the issues presented by this Petition. For example, it asserts that when viewed "as involving de jure segregation" the remedies invoked below "neither conflicts with that of any other Court of Appeals nor raises any new questions. (Govt. br. p. 8) Yet one month ago in three Southern desegregation cases before this Court, the Government declared its support of the neighborhood school concept and argued "all-black" schools may constitutionally

continue to exist even in formerly dual systems where this results from separate racial residential housing patterns. (See also President Nixon's desegregation policy statement, Dfts. App. Vol I, p. 218a 5). Given this position, it is difficult to comprehend the government's support for the "remedies invoked below" which forced School District 151 to abandon a neighborhood school policy and K-8 grade organization traceable back nearly four decades, and to bus approximately half of its student body in order to overcome racial imbalance and achieve integration at each of the six schools in the District

The argument that "racial imbalance" is not here involved because of the findings of discrimination is fallacious. Racial imbalance is nothing more than the existence, in a bi-racial district, of a predominantly white or black student body, which results from normal geographic attendance districts being super-imposed upon separate residential housing patterns. Implicit in the Government's prior arguments in the Southern desegregation cases is the recognition that such racial imbalance may exist even in those formerly "dual systems." See also *Ellis* v. *The Board of Public Instruction of Orange County, Florida* (#29124, 5th Cir. Feb. 17, 1970).

Separate housing patterns indisputably exist within School District 151 and that condition, in and of itself, coupled with any method of geographic school districting, would produce racial imbalance in the District's schools. (See HEW reports, Dft Ex 55, 56 2Tr 564, 570, 660, 661) As to the remedies invoked below, the issue, even assuming the existence of the claimed discriminatory conduct, is not "de facto" versus "de jure" segregation, but whether the School District was constitutionally required to adopt a desegregation plan to overcome racial imbalance

and to maximize integration at each of the District's schools.[1] Compare *Deal* v. *Cincinnati Board of Education* (2nd appeal) 419 F. 2d 1387, 1392-93 (6th Cir. 1969)

Moreover, the relief granted below is no less extreme in its scope and ultimate effect than that opposed by the Government in *Swann* v. *Charlotte-Mecklenburg Board of Education*, #14, 517 (4th Cir. May 26, 1970) pending before this Court Nos. 281, 349, this term. The wide ranging attack on the traditional educational policies of the District embodied in the Court's decrees has generated such community hostility that there is no possibility now, or in the foreseeable future, of passing the needed educational tax increase or a bond referendum to build a centrally located upper grade center.[2] At best, therefore, the children of the District are condemned to a mediocre and deteriorating educational system which is rapidly resegregating itself. See Yale Professor Alexander Bickel's article "Desegregation: Where Do We Go From Here?", "The New Republic" Magazine February 7, 1970.

If, for no other reason, we urge the Court to grant certiorari to review the extent of the mandatory injunctive relief imposed below.

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[1] Plans 1 and 2 filed pursuant to the preliminary injunction order by defendants called for the utilization of the Taft School as an upper grade center, the establishment of a non-discriminatory geographic districting based upon neighborhood attendance areas drawn in accordance with what the government contended should have been the boundaries, and the commitment of the Board to the construction of a centrally located upper grade center. See Dft App. Vol I p. 64, 78.

[2] The fifth straight attempt to increase the educational tax rate to alleviate an extreme debt situation and an attempt to increase the building tax rate were defeated by the voters in School District 151 on November 7, 1970 by almost a 2 to 1 margin.

The Government's semantic confusion is also evident in its repetition of the District Court's assertion that Petitioner's "affirmative and purposeful policies and practices . . . rendered de jure, the formerly extant de facto segregation". (Govt. br. p. 5) But the term "extant de facto segregation", recognizes the innocent nature in the change of the racial makeup in the Coolidge School during the years 1948 to 1956.[3] No invidious purpose, therefore, should have been attributed to Board actions taken prior to 1956 when Coolidge was an integrated school, and the number of "affirmative" acts since 1956 from which this so-called conversion from "de facto to de jure" might be based dwindles to: (a) the transfer of two children of a School Board member, who lived outside the City of Phoenix, to a school they should have attended anyway, and (b) the location of the Kennedy School on land already owned by the School Board to relieve an overcrowded school. No desegregation case has ever rested on such meager objective evidence.

See *Deal* v. *Cincinnati Board of Education,* (2nd appeal) 419 F. 2d 1387, 1393 (6th Cir. 1969).

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[3] In *Taylor* v. *Board of Education of New Rochelle,* 294 F. 2d 36 (2nd Cir. 1960) Cert. den. 368 U.S. 940 (1961), the Court held that the deliberate gerrymandering of the Lincoln School attendance boundaries so as to "coincide with Negro population movements" and the transferring of white children out of the Lincoln School attendance areas "combined with the prior gerrymandering" resulted in the Lincoln School becoming "a 100 per cent Negro school". This "crucial finding" — that the New Rochelle School Board had created this Negro School — led both the District Court and the majority of the Court of Appeals to find a constitutional violation which entitled the plaintiffs there to some relief. (294 F. 2d 38, 39) The essential element present in Taylor, however, is missing in the case at bar.

When the semantic fog which the Circuit Court majority refused to cut through has been lifted, it is apparent that the findings of discrimination among students rests not upon the Board's "affirmative" action, but its inaction in the face of racial imbalance. Thus, an invidious purpose was attributed to the Board's failure to alter the Coolidge-Roosevelt attendance boundary notwithstanding the fact that this same boundary had produced an integrated student body at Coolidge prior to 1956; to its failure to change bussing patterns which began in the early 1940's; to its failure to locate new school sites so as to promote integregation; and to its failure to change its educational structure by adopting an underfinanced and inadequate upper grade center for 7th and 8th graders at the Coolidge School. Fastening such affirmative obligations upon school boards is in serious conflict with the constitutional principles announced in *Bell* v. *Gary* and followed by the Sixth, Tenth, First and Second Circuits.[4] Moreover, the reliance upon the psychological motivations of individual School Board members to establish the unconstitutionality of the Board's conduct[5] is contrary to a long line of decisions by this Court prohibiting inquiry into legislative motives. (See original

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[4] *Bell* v. *School City of Gary,* 324 F. 2d 209 (7th Cir. 1963). Cert. den. 377 U.S. 924 (1964); *Deal* v. *Cincinnati Board of Education,* 369 F. 2d 555 (6th Cir. 1966). Cert. den. 389 U.S. 847 (1967), on second appeal 419 F. 2d 1387 (6th Cir. 1969); *Downs* v. *Board of Education of Kansas City,* 336 F. 2d 988 (10th Cir. 1964), Cert. den. 380 U.S. 914 (1965); see also *Springfield School Comm.* v. *Barksdale,* 348 F. 2d 261, 264 (1st Cir. 1965); *Offerman* v. *Nitkowski,* 378 F. 2d 22, 24 (2nd Cir. 1967).

[5] It is not just the reliance upon testimony of past and present school officials as indicated in the government's brief (p. 8 n. 4), but the process of psychoanalysis invoked below, which was erroneous. See Pet. App. 3a f.n. 4

Petition pp. 15-16). Jurisdiction of this Court is properly invoked to resolve such conflicts on matters of public importance.

It is also a distortion of the specific language and Congressional intent to argue that Section 2000 c-6 of the 1964 Civil Rights Act is not a prohibition against bussing, but was inserted to explain that the Act did not grant to Federal officials or Courts the "power to require remedial action by School Systems which were already in compliance with the Fourteenth Amendment". (Govt. br. p. 7) The restriction contained in Section 2000 c-6 can only be meant to apply to cases where unconstitutional segregation is found to exist because that Section authorizes the Government to sue only where there has been an allegedly unconstitutional denial of equal protection. The Attorney General may institute an action for such "relief as may be appropriate" when he receives a written complaint that a child, as a member of a class of persons similarly situated, is "being deprived by a School Board of the equal protection of the laws". It would have been entirely unnecessary for Congress to include the bussing proviso which follows had it not meant to restrict the relief which might be granted in suits brought under the Act.

This interpretation is strengthened by the definition of desegregation contained in the Act as "the assignment of students to public schools and within such schools without regard to their race, color . . . and shall not mean the assignment of students to public schools in order to overcome racial imbalance" 42 U.S.C. Section 2000 c-6 (b). Desegregation under the Act, therefore, merely places students in those schools in which they would have been enrolled had administrators and School Boards been "color blind". It assumes that students living within normal geographic districts shall attend the same school irrespec-

tive of their races and was intended to prohibit bussing out of such districts to achieve a certain racial mix in schools. See *Deal* v. *Cincinnati Board of Education,* (2d Appeal) 419 F. 2d 1387, 1391 (6th Cir. 1969); 110 Cong. Rec. 6820, 6841, 12714, 12715, 12886 and 13821.

With respect to the other procedural and evidentiary issues largely ignored by the Government, we do not dispute the propriety in appropriate cases of using certain evidence of statistical probability to infer the existence of a pattern of discrimination. The point here is that from a purely statistical basis the existence of a predominantly Negro School in a bi-racial school district is of no probative value in showing any official acts of discrimination and it is irrational to impose a contrary presumption.

Nor do we quarrel with the deference this Court held in *Zenith Corporation* v. *Hazeltine,* 395 U.S. 100, 123 must be given to decisions of the trial judge. But, *Zenith* assumed that he will "appraise and weigh" the evidence, which was not the situation in the case at bar.

It is also true that in *United States* v. *El Paso Gas Company,* 386 U.S. 551, 556-557 (1964) this Court allowed the findings to stand despite the mechanical adoption procedure followed by the lower court, noting, however, that the record "is composed largely of undisputed evidence". (P 557) Here, the factual evidence was hotly contested. Indeed, the very basis of the distinction, by the Circuit Court majority opinion drawn between *Bell* v. *Gary* and this case, was the findings of fact in favor of the Government and the rejection of the defense testimony and defense witnesses and their credibility. (Pet. App. 3a, 6a, 20a, 21a, 22a) Since the District Judge accepted, without changing a word, 123 pages of findings of fact, conclusions of law, determinations of credibility and injunction orders pre-

pared by the Government, it is not surprising that none of the defendants' contentions or testimony were accepted. What is surprising is the casual acceptance of this procedure, especially in view of the Trial Court's hostility toward defendants and prejudgment of the issues. Compare *United States* v. *Cassiagnol,* 420 F. 2d 868, 878 (4th Cir. 1970).

In *Bradley* v. *Maryland Casualty Company,* 382 F. 2d, 415 (8th Cir.) cited by the Government, the Court while sustaining the findings noted: (p. 423)

> "This is not a situation . . . where we might conclude, with justification, that the findings and conclusions are not the product of the Court's own careful consideration of the evidence, of the witnesses, and of the entire case."

We submit this is exactly such a case and properly calls for the exercise of this Court's supervisory powers.

CONCLUSION

We again submit this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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